Mini-Industries, Inc. *and* Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board. Case 26-CA-7394

April 16, 1981

DECISION AND ORDER

On February 14, 1980, Administrative Law Judge Alvin Lieberman issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and Respondent filed limited cross-exceptions and a brief both in support thereof and in answer to the Charging Party's exceptions. The Charging Party subsequently filed a brief opposing Respondent's cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mini-Industries, Inc., Columbia, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

MEMBER JENKINS, dissenting in part:

I join the majority in finding that Respondent violated Section 8(a)(1) of the Act by five acts of coercive interrogation, by threatening to close its plant if employees chose to be represented by the Union, and by promulgating and maintaining an overly broad no-solicitation, no-distribution rule. Contrary to my colleagues, however, I would also find that Respondent violated Section 8(a)(3) of the Act by discharging all of its employees on April 18, 1978,[3] and by thereafter, on or about May 1, selectively rehiring only certain of those employees.

Respondent operates two plants. The plant involved herein, referred to as Mini-Mills, manufactures T-shirts from its Columbia, Tennessee, location. The second plant, located in Littleton, Tennessee, and referred to as Mini-Screen, imprints those T-shirts and T-shirts from other manufacturers using a silk screen process. Previously separate but related corporations, Mini-Mills and Mini-Screen merged, in January, to form Respondent. The asserted reason for the merger was to reduce Federal tax liability by offsetting Mini-Screen's profits with the continuing losses incurred by Mini-Mills. John Hall, previously the chief executive officer and chairman of the board of directors of each corporation, became Respondent's executive secretary and chief operating officer. At approximately the same time, Hall hired Norman Carpenter as Mini-Mills' plant manager.

Respondent's chief customer was Adidas USA, Inc. Adidas purchased 90 percent of Respondent's output pursuant to a contract which specifically required Respondent to manufacture its own T-shirts and prohibited it from purchasing T-shirts from other manufacturers. Adidas representatives visited Respondent's plants periodically to evaluate the production capability of the plants and the manufacturing techniques and methods followed by Respondent.

On January 9, Carpenter assumed his role as plant manager. Carpenter's mandate from Hall was to try new ideas and innovations in an effort to reduce Mini-Mills' losses. Hall had considered closing Mini-Mills, but determined not to do so because he had been notified that officials from Adidas would be inspecting the plant in February. Between January and March, Mini-Mills' new plant manager implemented some of his innovations, in-

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge that Respondent did not violate Sec. 8(a)(3) and (1) of the Act either by discharging all employees and closing its T-shirt manufacturing plant on April 18, 1978, or by rehiring only certain former employees on and after the plant's May 1, 1978, reopening. Notwithstanding Respondent's undisputed antiunion animus and the suspicious coincidence between Respondent's actions and the Union's organizational campaign, neither Respondent's closing procedures nor its rehiring system manifested on its face a clear pattern of discrimination against union adherents, most of whose identities were unknown to Respondent. In addition, the credible, corroborative, and substantially uncontradicted testimony of Respondent's principal officers established Respondent's deteriorating financial condition as a valid reason for their actions. Although the closing and reopening procedures utilized in response to this financial problem may not have been reflective of sound business judgment, they were consistent with decisions made and production standards set prior to Respondent's awareness of the Union's campaign. Contrary to our dissenting colleague, we find from the evidence summarized above and more comprehensively analyzed by the Administrative Law Judge that the General Counsel has not met his initial burden of making a *prima facie* showing sufficient to support the inference that union activity was even a motivating factor in Respondent's decisions to close and later to reopen its plant. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

In agreeing that no bargaining order is necessary to remedy the 8(a)(1) violations found in this case, Chairman Fanning does not rely on the Administrative Law Judge's discussion of *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), as it is contrary to the opinion of himself and Member Jenkins in United Dairy. Member Zimmerman finds no need herein to express his view of the bargaining order issue presented in *United Dairy*, in which he did not participate.

[3] Unless otherwise noted, all dates are 1978.

cluding the establishment of a "training room" where new employees worked until achieving a certain production level and the establishment of a "bonus production line" composed of Mini-Mills' best employees. It appears that neither innovation was completely successful; however, the failure of the bonus production line was due, at least in part, to a shortage of materials which left employees with nothing to do for substantial periods of time.

In approximately mid-March, the Union commenced its organizational campaign among Mini-Mills' employees. The signing of union authorization cards began on April 4. By letter dated April 12, and received by Respondent the following day, the Union notified Respondent that four employees, Annie Patton, Patsy Baxter, Rita Beard, and Bonnie Malugin, comprised the Union's in-plant organizing committee. A second letter was received by Respondent on April 19, adding the name of employee Wilma Daniels to the in-plant organizing committee. Between April 4, when the first authorization card was executed, and April 18, when the plant was closed, approximately 20 or 21 employees signed cards designating the Union as their bargaining representative. Later, between April 18 and May 31, an additional 9 employees signed authorization cards; however, at no time during the organizational campaign did the Union secure cards from a majority of Respondent's approximately 69 or 70 employees.

Hall testified, and the Administrative Law Judge found, that Hall discussed the possibility of closing the plant with his plant manager and his comptroller sometime between March 30 and April 2, and decided at that time to close the plant following the plant inspection by Adidas scheduled for mid-April. By letter dated April 3, Adidas notified Respondent that an Adidas representative would visit the Mini-Mills plant on April 18. In preparation for that visit, Respondent engaged in the subterfuge of purchasing 4,000 dozen T-shirts from another manufacturer, removing their labels, and replacing them with the Adidas labels used by Respondent. The shirts were then strategically located throughout the Mini-Mills plant in such a fashion as to make it appear that they had been manufactured by Respondent. The avowed purpose of this stratagem, according to Carpenter, was "to pull the wool over the eyes of the Adidas people." On April 17, the Adidas representatives inspected the plant.[4] On the same day, agents from the Internal Revenue Service visited Mini-Mills and informed Hall that Respondent owed $54,000 in unremitted income taxes withheld from employees' wages. On April 18, Hall told his plant manager, his comptroller, and, finally, the employees that the plant was being shut down. In a speech to all employees, Hall stated that:

> [e]ffective today at 3:30 p.m. everyone in this plant is terminated for the balance of this week and beginning tonight we will be evaluating everyone's performance record up to this date. Mr. Carpenter has made a production and attendance graph for every employee. These records will be our guide for evaluating you for rehire. If we do decide to rehire you, we will notify you as soon as possible.

On April 19, Respondent filed a mass separation notice with the Tennessee Department of Employment Security, Unemployment Compensation Division, containing the names, social security numbers, hire dates, and job classifications of its 69 employees terminated the previous day. The mass separation notice indicated that the terminations were permanent. At the hearing, however, Hall testified that it was his intention to reopen the plant immediately but that he was unable to do so because he could not obtain any more cash from his two funding sources, bank loans and discounted invoices from Adidas.

On or about May 1, Respondent reopened the Mini-Mills plant. Contemporaneously, Respondent promulgated a new employee handbook for the Mini-Mills employees. This handbook included an invalid no-solicitation, no-distribution rule which the Administrative Law Judge found, and my colleagues and I agree, to have violated Section 8(a)(1) of the Act. The handbook also contained a "Statement on Unions," which provided, *inter alia*, that:

> There is no labor union in this plant. Just as every person has the right to make up his own mind whether he wants to join a labor union or not, or desires to work at a plant where there is no union, the Company also has the right to express its position regarding labor unions.
>
> It is the opinion of the Company that labor unions interfere with and prevent pleasant and desirable relations between the Company and the people who work there. The Company feels that there is now a feeling of mutual respect and good will between it and the employees. It intends to promote and maintain that feeling. It intends to consistently improve wages and benefits whenever and wherever possible to do so. It does not intend to make promises which it cannot keep. Unions do that freely. They are a disruptive influence in our

[4] The record does not reveal the reason for the discrepancy in inspection dates between April 17 and 18.

> opinion and contribute nothing constructive or helpful either to the employees or to the Company. The Company, therefore, opposes and will continue to oppose any labor union coming into this plant. We hope you agree.

The employee handbook further quoted the following passage, attributed to Elbert Hubbard, under the heading "A Thought To Remember":

> IF YOU WORK FOR A MAN, in Heaven's name, WORK for him. If he pays you wages which supply you bread and butter, work for him; speak well of him; stand by him and stand by the institution he represents. If put to a pinch, an ounce of loyalty is worth a pound of cleverness. If you must vilify, condemn and eternally disparage—resign your position, and when you are outside, damn to your heart's content but as long as you are part of the institution do not condemn it. If you do that, you are loosening the tendrils that are holding you to the institution, and at the first high wind that comes along, you will be uprooted and blown away, and probably will never know the reason why.

Upon its reopening, Mini-Mills rehired 21 employees and operated approximately one and one-half production lines, compared with the three or three and one-half lines which operated up to April 19. However, within several months of reopening, the Mini-Mills work force increased to approximately 72 employees, about the same number as were employed before the April terminations. Hall attributed his decision to reopen the plant to two factors. The first was receipt of a commitment from a Nashville bank to provide additional financing. The second factor cited by Hall was his inability to find an alternate supply of T-shirts to satisfy the backlog of orders from Adidas, or even to maintain full production at Mini-Screen. Indeed, it is undisputed that between April 19 and May 1 there were periodic layoffs of Mini-Screen employees due to the lack of production from Mini-Mills. It is further undisputed that Hall did not begin his search for an alternate source of supply of T-shirts until after the Mini-Mills employees were terminated on April 18.

Based upon the foregoing facts, the Administrative Law Judge found, and my colleagues agree, that Respondent closed its plant solely for valid economic reasons. The Administrative Law Judge's finding is based upon two factual premises: that Hall's decision to close the plant was reached weeks before Hall received notice of the Union's organization effort, and that when Hall did receive notice of the union campaign, it was "of no moment" to Hall because of his preoccupation with Respondent's financial problems. For the reasons that follow, I disagree with each of those premises.

Initially, I reject as unfounded the Administrative Law Judge's finding that Hall was unconcerned by the budding organizational effort when informed of the ongoing union activity by Plant Manager Carpenter. Although the Administrative Law Judge found that this information "was of no moment" to Hall because of his preoccupation with Respondent's financial difficulties, the evidence, in my view, points to the contrary. Thus, by May 1 Respondent produced its new employee handbook which included the invalid no-solicitation rule, its "Statements on Unions," and the Elbert Hubbard quotation, all of which are set forth above. Additionally, in August Respondent published an advertisement for employees in a local newspaper which stated, *inter alia*, that:

> [W]e don't have screaming, yelling types out there. Nobody will pressure you to join any organization, you don't have to put out $8.00 or $10.00 of your paycheck for dues. . . .

A similar advertisement was published in December, stating, *inter alia*, that:

> You don't have to pay any dues, initiation fees, penalties, fines or strike assessments to any organization to get your benefits. Nobody to tell you what to do on your job except your own supervisor . . . . Come on out and discover what it's like to work without being treated like a yo-yo.

All of the foregoing is, of course, in addition to the 8(a)(1) violations found by the Administrative Law Judge and adopted by my colleagues and me. Such actions and statements are hardly those of a person whose employees' involvement in a labor organization is of "no moment," but rather indicate that the discovery of union activity was a matter of great concern to Hall.

With regard to the timing of Hall's decision to close the plant, I believe it inherently incredible to find, as my colleagues do, that Hall's decision was reached weeks prior to his receipt of notice of the employees' union activities. It is undisputed that Hall did not seek an alternate source of supply for the T-shirts he needed to maintain production at Mini-Screen and satisfy Adidas' demands until April 18, the same day he terminated Mini-Mills' entire work force. Yet, at the time Hall shut down Mini-Mills, Respondent had an order backlog of approximately 41,000 dozen shirts from Adidas. Moreover, Hall did not inform Carpenter or Respondent's comptroller of the decision to close the

plant until approximately 11 a.m. on the same day that decision was published to employees. My colleagues' finding further ignores any impact of the April 17 visit to Mini-Mills by Internal Revenue Service agents regarding $54,000 in unremitted payroll taxes owed the Government. Hall himself testified that this debt to the Government was the "immediate predicate" for closing the plant. Indeed, Hall testified that the decision to close the plant was based upon three factors: a balance sheet prepared by Arthur Anderson & Company, reflecting Respondent's financial condition as of February 28; a deficient cash flow; and the April 17 demand by the Internal Revenue Service for $54,000 representing unremitted payroll taxes. However, an examination of the asserted reasons reveals that none holds water. The balance sheet prepared by Arthur Anderson was not received by Hall until May, well after the subject closing. Although a preliminary and tentative draft of the balance statement was apparently made available to Hall sometime earlier, Hall stated in his pretrial affidavit that he "didn't wait to receive the preliminary and tentative report from Arthur Anderson before making the decision to terminate operations."[5] As to Respondent's supposed inability to obtain additional financing, I believe that its acquisition of additional bank financing within 10 days of closing belies Respondent's assertions of financial extremes, and illustrates that it was not quite the "basket case" it would have us believe. And, as noted above, the IRS demand occurred well after the decision to close was assertedly made, and thus could hardly have been a basis for Respondent's decision to close the plant in late March or early April.

Turning now to the real motivation for the plant closing, it seems obvious to me that the true reason may be found in Hall's April 18 speech to employees, where he stated that employees would be terminated *for the balance of the week*, and thereafter evaluated for rehire. Such statement precludes any finding that the closing was intended to be permanent and suggests that Respondent never intended to close its plant for more than a very brief period of time, just long enough to fire its employees and engineer a method of defeating the union organizing drive.

In review of the foregoing, it is obvious that the General Counsel has met his burden of proving a *prima facie* case, as required by *Wright Line*.[6] Thus, Respondent's animus is well documented on the record, and the timing of the discharges and "closing," occurring just shortly after Respondent's discovery of the Union's organizing effort, strongly suggests an illegal motivation. It is also obvious, at least to me, that Respondent has not carried its burden under *Wright Line* to prove that it would have closed its plant even absent its employees' union activities. Thus, I believe it inherently improbable that an experienced businessman such as Hall would close his manufacturing plant, even if it was operating at a loss, and thereby necessitate layoffs or closing of his profitable printing plant,[7] would not inform his plant manager and comptroller of that decision in advance, and, most importantly, would not begin his search for an alternate supply of T-shirts until after the plant was closed. The foregoing, when added to the previous threat of plant closure and the obviously pretextual nature of at least some of the reasons asserted by Hall for the closure, suggests a finding that the real reason Hall closed his plant was to avoid the advent of the Union. This suggestion becomes a virtual mandate when the scales are further tilted by consideration of the fact that, between March 31 and April 18, Respondent hired 16 new employees to work at Mini-Mills, including 1 employee on April 17 and 2 employees on April 18. Accordingly, I would find that by discharging its employees and closing its plant on April 18, Respondent violated Section 8(a)(3) and (1) of the Act. See *California Bake-N-Serve Ltd.*, 227 NLRB 548 (1976); *Saginaw Aggregates, Inc.*, 191 NLRB 553 (1971). I am puzzled by my colleagues' finding that the General Counsel has not met his initial burden of making a *prima facie* showing sufficient to support the inference that union activity was even a motivating factor in Respondent's decisions to close and later reopen its plant. As noted above, Respondent's animus is patent, Respondent was aware that a union organizing campaign was ongoing, and the plant closing occurred just 4 days after Respondent received formal notice from the Union that it was in the midst of an organizational campaign. Also supporting the existence of a *prima facie* case is Respondent's failure to rehire any of the five known members of the employee organizing committee. It thus seems apparent that, at a minimum, the General Counsel fulfilled his obligation to prove a *prima facie* case of discrimination.

With regard to the complaint's allegation relating to Respondent's recall of employees upon reopening the Mini-Mills plant on or about May 1, I would find that the entire recall procedure was dis-

[5] It is also worthy of note that the balance sheet was prepared from unaudited financial statements, as to which Arthur Anderson & Company expressed no opinion.

[6] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083. See *Weather Tamer, Inc., and Tuskegee Garment Corporation*, 253 NLRB 293 (1980).

[7] Respondent's balance sheets reveal that from May 27, 1977, to September 30, 1977, Mini-Mills had a net loss of $90,412, while Mini-Screen had a net profit of $111,648.

criminatorily motivated and that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to rehire the discharged employees because of their union activities or sympathies. Having discharged its entire work force in order to destroy the Union's organizational campaign, Respondent was not about to rehire those same employees. Instead, it devised a subterfuge which made it appear that employees were rated by merit, while in fact basing its decision as to which employees would be rehired on subjective considerations, including Respondent's estimate of each employee's union activities.

The decision as to which employees would be rehired was made by Carpenter, who testified that his decisions were made based upon his evaluation of the production graphs of each employee. However, Carpenter did not use uniform standards but rather used different standards depending on whether the particular employee had been hired before or after February 6. If hired before February 6, Carpenter rehired the employee only if she had a "large portion" of her production days above a certain level. If hired after February 6, the employee was recalled if her production rate was above a training curve, which was based upon expected production. With respect to the more senior employees, Carpenter testified that he looked at the charts on a case-by-case basis, but could not define an objective standard for what he considered was a "large portion" justifying rehire. At first blush, the use of differing standards for "new" and "old" employees appears without reason. However, a closer examination reveals that all five members of the Union's organizing committee were "older" employees. Thus, it appears clear that Carpenter calculated that most of the union adherents would be among Respondent's "older" employees, and structured his rehiring accordingly. Every member of the Union's organizing committee was refused rehire. Employees who had been chosen just a brief time before for the bonus production line on the basis of being Respondent's best producers were refused rehire.

Thus, the majority's contention that reopening procedures were consistent with decisions made and production standards set prior to Respondent's awareness of the Union's campaign is seriously flawed. It hardly seems probable that an employer would fail to rehire those employees whom it recognized as its best producers only a short time before, unless that employer was concerned about some aspect of their employment other than work performance, such as union activities. Even more flawed is the majority's finding that the plant closing procedure was similarly consistent with decisions made prior to knowledge of the union campaign. As noted above, Respondent hired 16 new employees between March 31 and April 18, including 1 employee on April 17 and 2 employees on April 18. Such hiring is obviously inconsistent with any alleged decision to close the plant predating knowledge of the union campaign. Similarly, Hall's inexplicable failure to arrange for a substitute supply of blank T-shirts prior to April 18 is also inconsistent with any such decision. Even when Mini-Mills expanded its work force to pre-termination levels, the discharged employees were refused rehire. Rather, Respondent published newspaper advertisements for new employees which clearly revealed its union animus and implicitly warned that employees with different feelings concerning unions need not apply.

In summary, the record herein reveals an avowed antiunion employer who embarked upon a rather transparent attempt to circumvent the protections guaranteed to employees in Section 7 of the Act by temporarily closing its plant and shortly thereafter reopening with a different employee complement. That Respondent would attempt this is not, perhaps, surprising. But that my colleagues find merit in Respondent's obviously contrived tale of woe is. I dissent.

DECISION

STATEMENT OF THE CASE

ALVIN LIEBERMAN, Administrative Law Judge: The hearing in this proceeding, with all parties represented, was held before me in Columbia, Tennessee, on the General Counsel's complaint and amendment to the complaint[1] and Respondent's answers.[2] In general, the issues litigated were whether Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act.[3] More particularly, the questions for decision are as follows:

[1] Hereinafter these pleadings will be referred to jointly as the complaint. At the hearing, the complaint was amended by changing the date appearing in par. 7 from April 4, 1978, to April 11, 1978; designating par. 7 as par. 7(a); and adding the following new paragraph:

> 7(b). Respondent, by its supervisors and agents set forth below, on or about the date set forth below, at its Columbia, Tennessee, location, interrogated its employees concerning its employees union membership, activities and desires. Norman Carpenter—on or about April 11, 12 and 14, 1978. Pearl Boshears—on or about April 11 and 12, 1978.

Also at hearing the words "and enforced" were stricken from par. 8 of the complaint.

[2] Hereinafter these pleadings will be referred to jointly as the answer. At the hearing, the answer was amended to deny the allegations contained in par. 11 of the complaint.

[3] Set forth below are the relevant provisions of the sections of the Act to which reference has been made in the text:

Continued

1. Did Respondent violate Section 8(a)(1) of the Act by, as alleged in the complaint, interrogating and threatening employees, and by promulgating and maintaining an invalid rule prohibiting solicitation and distribution of literature?

2. Did Respondent violate Section 8(a)(3) of the Act by, as alleged in the complaint, discharging employees on April 18, 1978?

3. Did Respondent violate Section 8(a)(3) of the Act by, as alleged in the complaint, failing on May 1, 1978, to rehire all employees discharged on April 18, 1978?

4. Assuming an affirmative answer to the foregoing questions, should an order issue requiring Respondent to bargain with Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board (herein called the Union)?[4]

Upon the entire record,[5] and having taken into account the arguments made and the briefs submitted,[6] I make the following:

FINDINGS OF FACT[7]

I. JURISDICTION

Respondent is engaged in the State of Tennessee in manufacturing, printing, by means of a silk screen process, and selling T-shirts. During the 12 months preceding the issuance of the complaint, a representative period, Respondent sold T-shirts valued at more than $50,000 to customers located outside the State of Tennessee. Accordingly, I find that Respondent is engaged in commerce within the meaning of the Act and that the assertion of jurisdiction over this matter by the National Labor Relations Board (herein called the Board) is warranted.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. INTRODUCTION

This proceeding is concerned with events following the institution of the Union's campaign to organize Respondent's employees and become their collective-bargaining representative. Included among these are; (1) the discharge of Respondent's employees when it closed its manufacturing plant; (2) the failure to put them all back to work when the plant was reopened.

The complaint alleges, and the answer denies, that in the foregoing manner Respondent violated Section 8(a)(3) of the Act. The complaint further alleges, and the answer also denies, that Respondent committed unfair labor practices falling within the ambit of Section 8(a)(1) by interrogating and threatening employees and by promulgating and maintaining an invalid rule prohibiting solicitation and distribution of literature.

IV. PRELIMINARY FINDINGS[8]

A. *Credibility*

My credibility resolutions are inherent in the nature of the findings set forth in this Decision. In resolving credibility I have fully considered and evaluated the testimony on both sides of each issue raised by the pleadings in the light of its probability and plausibility. Furthermore, in determining whether to credit or discredit witnesses I have taken into account their demeanor while testifying and their interest in the outcome of this proceeding.

I am urged to disbelieve the testimony given by John Hall, Respondent's executive secretary, because it did not comport in all respects with his pretrial affidavit and because it was, allegedly, evasive. Concerning the former, Hall, in large measure, adequately explained the discrepancies. Regarding the latter, Hall's claimed evasiveness consisted, in the main, of his initial failure to provide a categorical "yes" or "no" answer to questions calling for that type of response. However, each time this occurred Hall was directed to give such an answer and, without further quibble, he did so. In view of the foregoing, and taking into account Hall's satisfactory demeanor while on the witness stand, my assessment of his testimony is that it was truthful.

I am also urged to discredit the testimony given by Norman Carpenter, the manager of Respondent's manufacturing plant, respecting matters related to its closing

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Sec. 8(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . .

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees . . . .

Insofar as pertinent, Sec. 7 is as follows:

Sec. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

[4] Concerning this issue, which can be disposed of summarily here, the complaint, describing Respondent's claimed unfair labor practices as being "outrageous and pervasive in character," prays that they be remedied by the entry of a bargaining order. However, the General Counsel and the Union concede that the Union did not, at any material time, represent a majority of Respondent's employees in a unit appropriate for collective bargaining. This being the case, a bargaining order will not lie. *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979); *Haddon House Food Products, Inc. and Flavor Delight, Inc.*, 242 NLRB 1057 (1979). My Order will, therefore, provide for the dismissal of pars. 14, 15, 16, and the relating portions of pars. 17 and 18, of the complaint.

[5] Certain errors in the transcript are hereby noted and corrected.

[6] Although all the arguments of the parties and the authorities cited by them, whether appearing in their briefs, or made orally at hearing, may not be discussed, each has been carefully weighed and considered.

[7] Respondent's motion made at the conclusion of the hearing, upon which decision was reserved, is disposed of in accordance with the findings and conclusions set forth in this decision.

[8] The purpose of these findings is to furnish a frame of reference within which to consider the facts relating to Respondent's alleged unfair labor practices.

and reopening.[9] Like Hall, whose testimony was principally concerned with these events, Carpenter demeaned himself well during his examination on this topic. His evidence on this subject was plausible, supported by documentary proof, not materially contradicted, and forthrightly given.

The same situation does not obtain regarding Carpenter's denials of statements attributed to him in the area of this case dealing with Respondent's alleged independent violations of Section 8(a)(1) of the Act. Accordingly, in this respect Carpenter's denials have not been credited.

Although I have discredited Carpenter's testimony relating to Respondent's claimed independent violations of Section 8(a)(1) of the Act, it does not follow that all his testimony must be disbelieved. "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950), revised on other grounds 340 U.S. 474 (1951). Relying on *Universal Camera*, the Board stated in *Maximum Precision Metal Products, Inc., Renault & Stamping Ltd.*, 236 NLRB 1417 (1978), "We do not believe . . . that an Administrative Law Judge is required to discount all of the testimony of a witness because he is not persuaded by some of it."

Accordingly, for the reasons already stated, I have credited Carpenter's testimony concerning the manufacturing plant's closing, reopening, and attendant matters.

B. *Respondent's Business*

Respondent owns and operates two plants. At one, located in Columbia, Tennessee, Respondent manufactures T-shirts. At Respondent's second plant, located in Littlelot, Tennessee, shirts produced by Respondent and other manfacturers are imprinted, by means of a silk screen process, with designs ordered by Respondent's customers.

The two facilities were originally owned by separate but related corporations. The corporation operating the manufacturing plant was Mini Mills, Inc. (herein called Mini Mills). The corporation operating the printing plant was Mini Screen Printers, Inc. (herein called Mini Screen). John Hall was chairman of the board of directors and chief executive officer of both entities.

For reasons to be set forth in detail below, on January 31, 1978,[10] the two corporations were merged to form Mini-Industries, Inc. (herein called Mini Industries), Respondent in this proceeding.[11] Following the merger, Hall became Respondent's executive secretary.

C. *Respondent's Manufacturing Method and Related Matters*

In manufacturing T-shirts, Respondent utilizes what may be termed an assembly line process. The persons staffing the line consist of women who operate sewing machines, each one sewing a part of a shirt. The garment is then passed to the next employee on the line who performs a different operation on the same shirt until, finally, a complete article is produced.

Respondent's operators are not all paid on the same basis. Some, who may loosely be called piece workers, received, at material times, $3.11 an hour, provided they produced each day a set amount of work. An employee in this category who did so was considered as having "made production." Those who failed to make production on a particular day were paid at the legal minimum rate for each hour worked that day.

Also employed by Respondent at material times were operators referred to at hearing as "time workers." Employees in this group were paid a stated hourly wage, which was not dependent on their production.

D. *Respondent's Relationship to Adidas*

At all material times, Adidas USA, Inc. (herein called Adidas), has been the principal customer of Respondent's manufacturing and printing plants. Adidas buys about 90 percent of the T-shirts made and printed by Respondent.

Respondent's contract with Adidas requires Respondent to manufacture and imprint with Adidas designs the T-shirts it sells to Adidas. Also, the contract prohibits Respondent from buying for printing and resale to Adidas shirts made by other manufacturers.

From time to time representatives of Adidas visit Respondent's manufacturing and printing plants. The purpose of these visits is to enable the Adidas representatives to evaluate the production capability of the plants and the manufacturing techniques and methods followed by Respondent.

E. *The Union's Organizing Campaign*

The Union's campaign to organize Respondent's employees and become their collective-bargaining representative began in the middle of March 1978. Between April 4 and May 8 cards designating the Union as their collective-bargaining agent were signed by 28 employees.

V. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts, Contentions, and Conclusions Concerning Respondent's Alleged 8(a)(1) Violation*

As stated in the introductory portion of this Decision, the complaint alleges that Respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees. It also alleges that Respondent further violated Section 8(a)(1) by promulgating and maintaining an invalid rule prohibiting solicitation and distribution of literature. These allegations, denied by Respondent, will be considered below.

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[9] As will appear, this proceeding is mainly concerned with these matters.

[10] All dates subsequently mentioned without stating a year fall within 1978.

[11] The allegations of the complaint deal with events occurring at the manufacturing facility formerly owned by Mini Mills which was not, as a result of the merger, physically consolidated with that previously owned by Mini Screen. Accordingly, unless otherwise specified, all subsequent reference to Respondent or to its plant relate to the operation formerly conducted by Mini Mills, which was continued by Respondent after the merger.

1. The interrogation

Without complying with any of the safeguards enumerated in *Struksnes Construction Co., Inc.*, 165 NLRB 1062, 1063 (1967), employees were questioned about the Union by Norman Carpenter and Pearl Boshears, respectively Respondent's plant manager and assistant plant manager.[12] In *Struksnes*, the Board set forth five criteria for determining the unlawfulness of interrogation of employees concerning a union. One of these, not complied with here,[13] is that "assurances against reprisal are given." This being the case, I find that the questioning of Respondent's employees was coercive and, therefore, in derogation of the rights guaranteed in Section 7 of the Act.

Accordingly, I conclude that by coercively interrogating employees concerning the Union, Respondent violated Section 8(a)(1) of the Act.

2. The threat

As found on April 11, 1978, Wilma Daniels, an employee, was interrogated by Plant Manager Norman Carpenter. During the course of the interrogation Carpenter, upon being informed by Daniels that she had signed a union card, told her, as she testified, that John Hall, Respondent's executive secretary, had "said he would hand them the keys before he would let a union in."

Although somewhat ambiguous, the words attributed to Hall by Carpenter constituted, I find, a threat to close the plant upon the Union's advent. However, no evidence was adduced to establish that Hall made the statement, described to him by Carpenter. Because of this, I further find that Carpenter, not Hall, was the author of the threat. Notwithstanding this, on well settled principles, Respondent must bear the threat's onus by reason of Carpenter's position as its plant manager.

Carpenter's threat being inherently coercive, it was violative of Section 8(a)(1) of the Act. Furthermore, having been uttered while Carpenter was interrogating Daniels, it imparted an additional element of coercion to the interrogation. *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478, 483 (1977).

Accordingly, I conclude that by Carpenter's threat that the plant would be closed upon the Union advent Respondent violated Section 8(a)(1) of the Act.

3. The rule

Early in May 1978 Respondent issued a handbook[14] to its employees listing "violations that would result in immediate and automatic termination of employment." Included among these is the "circulation of handbills, circulars, petitions or solicitations before, during, or after hours on Company property."[15]

On its face the no-solicitation rule is overbroad and, therefore, presumptively invalid. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 617, 621 (1962). Respondent offered no proof to overcome this presumption. Instead, it argues that because, as the evidence shows, the rule was never enforced, its promulgation and maintenance was not violative of the Act. This argument lacks merit, it being "well established that the mere existence of an unlawful no-solicitation rule makes it susceptible of application to employees and this factor alone tends to coerce, restrain, and interfere with their right to engage in self-organizational activities." *The Great Atlantic & Pacific Tea Company, Inc.*, 162 NLRB 1182, 1184 (1967).

Accordingly, I conclude that by promulgating and maintaining an invalid no-solicitation rule, Respondent violated Section 8(a)(1) of the Act.

B. *Facts, Contentions, and Conclusions Concerning Respondent's Alleged 8(a)(3) Violations of the Act*

The complaint alleges that by discharging its employees on April 18, 1978, on its plant's closing, Respondent violated Section 8(a)(3) of the Act. The complaint further alleges that by failing to rehire all employees discharged on April 18 when the plant reopened on May 1 Respondent committed an additional violation of Section 8(a)(3). These allegations will be separately considered.

1. Facts concerning the plant's closing and the attendant discharges

a. *An overview of Respondent's financial and operational problems*

Respondent opened its plant on May 27, 1977. Its principal reason for doing so was to enable it to perform its contract to manufacture T-shirts for Adidas. From the outset Respondent was beset with problems.

It suffered from an inability to generate enough cash to pay its bills for material and to meet its operating expenses. This required it to borrow money from a local bank. By April 1979 its bank loans were, as John Hall, Respondent's executive secretary, testified, "at their maximum [and Respondent was unable to] count on the bank for any more borrowing."

In addition, Respondent's lack of cash caused it to experience a problem in another area. It was not remitting to the government income taxes withheld from employees' wages. At the end of the first quarter of 1978 Respondent's unpaid obligation in this regard amounted to $54,000.

Furthermore, because of production inefficiencies Respondent was unable to manufacture shirts fast enough to keep up with orders placed with it by Adidas. Thus, by March 1978 it had an order backlog of some 41,000 dozen shirts. Based on its production capability as of that

[12] The employees interrogated, the dates of their interrogation, and the officials questioning them were Nancy Shelton, interrogated on April 11 and 12, 1978, by Carpenter and Boshears; Wilma Daniels, interrogated on April 11 by Carpenter; and Debbie Campbell, interrogated on April 14 by Carpenter. Although Carpenter denied having engaged in any conduct alleged in the complaint as having been violative of Sec. 8(a)(1) of the Act, his denials, for reasons already stated, are discredited. For the same reasons, I discredit Boshears' denial that she interrogated Shelton.

[13] My discussion of only one of the *Struksnes* standards should not be construed as an indication that I am satisfied that the other four were met.

[14] G.C. Exh. 13.

[15] Although prohibiting circulation of material as well as oral solicitation, this prohibition will, for convenience, be referred to as a "no-solicitation" rule.

time it would have taken Respondent more than 5 months to fill these orders.

b. *The events culminating in the plant's closing and the attendant discharge of employees*

Before the consolidation of Mini Mills and Mini Screen, Arthur Anderson & Co. (herein called Anderson), an accounting firm, prepared a financial statement[16] for Mini Mills, the then owner of the plant. The statement showed that from its inception on May 27, 1977, until September 30, 1977, Mini Mills' liabilities exceeded its assets by about $180,000; that its working capital had decreased by about $180,000; and that it had incurred a net loss of about $90,000.

In November 1977 James Ford, then an Anderson account manager, who had supervised the preparation of the financial statement reviewed it with John Hall, Mini Mills' chief executive officer. Ford informed Hall that Mini Mills "had substantial problems," bottomed on the fact that its manufacturing cost exceeded the price at which it sold its products. At the same time Ford advised Hall either "to reduce the manufacturing costs below the sales price [or] to shut the plant down."

Concerning the latter, Hall told Ford that because of the contract with Adidas he "needed to keep the plant running." Hall also told Ford that he was "thinking of hiring another production manager to try to alleviate Mini Mills' problems."

In view of this, Ford recommended the merger of Mini Mills and Mini Screen. Ford suggested this course because Mini Screen "was operating at a profit [and Mini Mills] at a loss," and for the further reason that the consolidation would give Mini Screen a tax advantage. Following Ford's advice in this respect, on January 31, 1978, as already noted, the two corporations were merged to form Mini-Industries, Inc., Respondent in this proceeding.[17]

In December 1977 Hall and Norman Carpenter, who later became Respondent's plant manager, spoke with each other several times concerning Mini Mills' precarious financial situation. During their conversations Hall told Carpenter, as the latter related, that he was "losing money at [Mini Mills] faster than he could make it at [Mini Screen]"; that for this reason he had considered discharging all employees, but that he could not do so because he had people coming in from Adidas [and he] had to be able to show them the plant." Carpenter, an experienced manager of garment manufacturing plants, replied, as he further testified, that he "felt [he] could turn [the] operation around and make Mini Mills a profitable cut and sew operation." Accordingly, Carpenter was hired as Mini Mills' plant manager.

Carpenter assumed his duties at the plant on January 9, 1978. At that time there were 3-1/2 production lines in operation.

Among the first things he did was to design a chart, in the form of a graph, on which to record daily production of each piece-worker. The chart also shows, in dozens of T-shirts worked on, how much work such an employee had to do each day on her operation to earn the legal hourly minimum wage,[18] and the number of dozens an employee had to work on each day to make production.[19]

Another innovation introduced by Carpenter to enhance the plant's productivity was to set up, toward the end of January, a bonus line staffed by Respondent's best producers, "although" as Carpenter testified, "none [was] making production." Employees on the bonus line were paid 20 percent above the regular wage rate, provided they were not absent on any working day. However, as Carpenter further related, the "bonus line [turned out to be] a total, absolute flop," and was soon discontinued.

Carpenter instituted a third method for increasing employee efficiency and productivity. On or about February 13, he established a training room in which inexperienced people, hired after that date, received instruction from a training supervisor in the sewing operation to which they would ultimately be assigned.

To measure a trainee's progress a training chart was devised for each sewing operation performed in the plant.[20] The charts set forth, by week, the trainees' expected level of production for the operation concerned.

Upon demonstrating an ability to turn out daily the amount of goods set forth on the chart for the second week of training, the trainee left the training room and joined a regular production line.[21] Notwithstanding this, the trainee remained under the supervision of the training supervisor until reaching the expected production level provided for in the appropriate chart for the last week of training.

Although the bonus line had failed to increase Respondent's production, the training room did, to a limited extent, have such a result. As Plant Manager Carpenter testified in this regard, "several trainees . . . that had never sewed on a T-shirt made more production . . . than . . . operators with 6 or 7 months experience . . . on the line."

Despite the narrow success of the training room, Respondent's overall production did not improve and the plant continued to lose substantial amounts of money. Concerning the latter, as Hall, Respondent's executive secretary, testified, "through January, February, and March [Respondent lost] money at a clip of about $17,000 a month."

In March and early April, while Respondent was expecting a visit by representatives of Adidas,[22] Hall had several conferences with Plant Manager Carpenter, and its comptroller. At one such meeting Hall informed the

[16] Resp. Exh. 11.

[17] The findings in this and the preceding two paragraphs are based upon, and the quotations appearing in the text are taken from, Ford's testimony.

[18] This is indicated on the graph (G.C. Exh. 17), when held in a horizontal position with the name of the employee at the top, by the heavy line nearest the bottom.

[19] This is indicated by the heavy line nearest the top of the graph. An explanation of what is meant by "mak[ing] production" appears in the section of this Decision entitled "Respondent's Manufacturing Method and Related Matters."

[20] At the hearing these charts were sometimes referred to as "training curves."

[21] Some trainees reached this level of production in less than 2 weeks.

[22] As earlier found, representatives of Adidas made periodic visits to Respondent's manufacturing and printing plants to evaluate, among other things, their production capability.

other conferees, as Carpenter testified, that Respondent was "broke" and that he had decided to close the plant. However, Hall was fearful that if he did so before the visit by Adidas' representatives, Respondent would lose Adidas as a customer not only of its manufacturing plant, but also of its printing plant. Accordingly, Hall resolved not to implement his decision to close the plant before its inspection by Adidas' representatives, but to do so on its completion.

On April 13 or 14 Respondent received a letter from the Union stating that several of its employees were members of the Union's organizing committee. About "two or three weeks" earlier, as Hall testified, he had been informed by Carpenter "that he [Carpenter] had heard that there was some card signing going on." Although Hall was unable to pinpoint the date on which he received this information from Carpenter,[23] I find that it was probably on, or after, April 11 and could not have been earlier than April 4, the day on which the first union card was signed.[24]

Hall was not impressed by this news. As he testified in this respect, the information he received from Carpenter was of so little "interest to him [because of Respondent's] financial problems that [he] didn't pay any attention to it."

In the meanwhile, in a letter from Adidas, dated April 3,[25] Respondent was informed that its long awaited visit by Adidas' representatives would take place on April 18.[26] In the same letter Adidas requested Respondent to "plan on showing [its representatives] thru (sic) [Respondent's] facilities."

Upon receipt of the letter from Adidas, Respondent had a backlog of unfilled orders from Adidas totaling about 41,000 dozen T-shirts. Accordingly, Respondent planned a stratagem, the purpose of which was, as Plant Manager Carpenter testified, "to pull the wool over the eyes of the Adidas people."

This consisted of Respondent's purchasing, in violation of its contract with Adidas, some 4,000 dozen T-shirts, removing their labels, and replacing them with Adidas labels. After the exchange of labels, the shirts were placed at locations in the plant where they would be seen by the Adidas representatives and arranged in such a fashion as to make it appear that they had been manufactured by Respondent.

Although the letter from Adidas stated that its representatives would arrive on April 18, they actually arrived on April 17. On that day they went through the plant and were, apparently, satisfied by what they saw.

On the same day, agents of the Internal Revenue Service came to the plant and informed Hall, Respondent's executive secretary, that Respondent owed $54,000 in unremitted income taxes withheld from employees' wages. They demanded that this obligation be liquidated within a week.

This being the case, and the Adidas' representatives having come and gone, on the next day, April 18, Hall effectuated his decision to close the plant. Hall did so, as he stated, "to stop the cash drain immediately."

Upon the plant's closing, Hall, in a speech to the employees,[27] stated that the plant was being shut down because it was "not operating profitably," for which reason, Hall continued, "everyone in [the] plant is terminated."

2. Contentions and concluding findings concerning the plant's closing and the attendant discharges

Respondent asserts that its decision to close the plant, resulting in the discharge of its employees, was based solely on legitimate business needs and economic factors. Notwithstanding that this assertion is supported by abundant evidence,[28] not materially controverted, given by witnesses whom I have credited, the General Counsel and the Union contend[29] that union, not economic, considerations, including the Union's organizing campaign, moved Respondent to close the plant and discharge its employees.[30] I do not agree.

The General Counsel seeks to bolster his position that the plant's closing and the employees' discharge was motivated by the Union's organizing campaign by pointing to the fact that the plant was closed a few days after the delivery to Respondent of the Union's letter notifying it that several employees had become members of the Union's organizing committee. The General Counsel's position does not gain support from this sequence of events. It overlooks the more salient fact that the decision to close the plant upon the completion of its inspection by Adidas' representatives was made by Hall, Respondent's executive secretary, weeks before Respondent

[23] Considering the fact that Hall's testimony was given some 10 months after the event here under discussion, Hall's inability to fix, accurately, the date on which Carpenter spoke to him about employees signing cards is understandable.

[24] My finding concerning the probability that Carpenter spoke to Hall about this matter on, or after, April 11 is reinforced by the fact that, as disclosed by the evidence, the first interrogation of any employee regarding the Union occurred on that date, at which time, as has been found, Wilma Daniels told Carpenter that she had signed a union card. Furthermore, the evidence does not show that Carpenter learned before then from another source that any employee had signed a card.

[25] G.C. Exh. 10.

[26] Although Respondent had known since January that representatives of Adidas would visit its plants, the actual date of the visit was not made known to Respondent until it was stated in the April 3 letter from Adidas.

[27] G.C. Exh. 11.

[28] In brief recapitulation, this consists of, among other things, Respondent's poor cash position; its continued revenue losses; its inability to produce a sufficient quantity of T-shirts to fill orders placed by Adidas, its principal customer; the unsuccessful measures it took to alleviate this condition; the stratagem it devised to deceive Adidas concerning its production capability; and its tax arrearage.

[29] The contentions of the General Counsel and the Union being similar, they will be referred to hereinafter as the General Counsel's contention, unless otherwise specified.

[30] In this connection, the Union argues, on brief, that "assuming *arguendo* that Hall [Respondent's executive secretary] closed the plant . . . for legitimate economic reasons"; "Respondent, nevertheless, violated the Act by "firing . . . the entire work force," rather than choosing "as the method of separation . . . some other technique such as lay off." This is so, the Union's argument continues, for the reason that it "raises the inference that Respondent chose the discharge method because that would have the most chilling effect on the . . . employees' desire to continue organizing." The short answer to this argument is that in the situation merely assumed by the Union, but which I find to be the actual fact, it is not within the Board's competence to second guess Respondent's business judgment regarding the manner in which it dealt with its employees on the plant's closing.

received the Union's letter. An additional fact overlooked by the General Counsel regarding Hall's decision to close the plant is that it even antedated the information he received from Plant Manager Carpenter, concerning the signing of union cards by employees.[31]

The Adidas representative inspected the plant on April 17 and, in accordance with the plan previously formulated by Hall, the plant was closed the very next day. The absence of any deviation from Hall's schedule for the plant's closing speaks louder in my ears than the General Counsel's argument that the Union's letter induced Hall to close.

Therefore, in agreement with Respondent, I find that the plant was closed and employees were discharged for legitimate economic reasons and not, as the General Counsel contends, for reasons interdicted by the Act.

Accordingly, I conclude that Respondent did not violate Section 8(a)(3) of the Act by discharging its employees on the closing of its plant, on April 18, 1978. Consequently, my Order will provide for the dismissal of paragraph 11, and the relating portions of paragraphs 13, 17, and 18, of the complaint.

3. Facts concerning Respondent's failure to rehire, on plant's reopening, all employees discharged on April 18, 1978[32]

When Executive Secretary John Hall made his decision to close Respondent's manufacturing plant he realized that if it remained closed Respondent would be unable to retain Adidas as a customer of its printing plant because, as earlier set forth, Respondent's contract with Adidas forbade it from imprinting Adidas designs on T-shirts purchased from other manufacturers. Accordingly, it was Hall's plan when he decided to close the manufacturing plant, to reopen it if he could obtain working capital.

In discussing this plan with Norman Carpenter, Respondent's plant manager, before the plant closed, Carpenter suggested to Hall that if capital could be gotten and the plant was reopened, it could operate with only one production line, instead of the 3-1/2 then being utilized, staffed by trainees and experienced employees whose production, as Carpenter testified as "up around minimum wage." Hall ultimately adopted this suggestion.

Some days after the plant was closed, Respondent received a commitment from a Nashville bank to provide the financing necessary to enable it to reopen the plant. Having obtained this assurance of capital, the plant, operating with only one production line, was reopened on May 1, 1978. In the interim, Hall instructed Carpenter to arrange to rehire a sufficient number of sewing machine operators to staff a single production line.

In doing so, Carpenter adopted criteria for determining the eligibility of an employee for reemployment based on her preclosing production record, if she was a piece worker, as shown on the employee's production graph.[33] As Carpenter testified, if the graph showed, in the case of an experienced operator in this category that she "had a large portion of her production days above [the graph's] minimum wage . . . line" she was eligible for rehire. As Carpenter further testified, a trainee in this class was eligible for rehire if her graph showed that she "worked above the training curve."[34]

Carpenter also adopted a standard for determining the eligibility for rehire of operators who were timeworkers. This consisted, as Carpenter explained, of his evaluation of their day-to-day job performance.

Applying the foregoing criteria, with one exception,[35] 21 operators were rehired. Included in this group were six union card signers, four of whom[36] signed before the plant was reopened and two[37] within days after the reopening. Not included in this group were two card signers[38] who met the eligibility standards for rehire and two employees[39] who also met those standards, but who did not sign cards. Also among the employees who were not recalled were the members of the Union's organizing committee, composed of five employees, four of whom[40] did not meet the eligibility standards.[41]

4. Contentions and conclusions concerning Respondent's failure to rehire, on the plant's reopening, all employees discharged on April 18, 1978

In considering Respondent's alleged violation of the Act in not rehiring all discharged employees upon the plant's reopening,[42] analysis starts with an examination of the standards of eligibility for reemployment adopted by Respondent to determine whether they were discriminatory within the meaning of the Act. This is not appar-

[31] As has been found, this information was of no moment to Hall because of his preoccupation with Respondent's financial problems.

[32] As noted, the complaint alleges, in this regard, that Respondent's failure to rehire all discharged employees on the plant's reopening was violative of Section 8(a)(3) of the Act.

[33] As earlier found, Respondent recorded on a chart, in the form of a graph, the daily production of each such worker.

[34] In the text accompanying fn. 20, the training curves and their function are described.

[35] The exception relates to Dale Busby, a trainee whose job classification was "close 1st shoulder." Although Busby never reached the training curve level for this operation, she was rehired. However, the only other employees performing "close 1st shoulder" work before the plant closed were experienced operators, none of whom met the eligibility standard for reemployment. In the circumstances Carpenter cannot be faulted for recalling Busby, notwithstanding that she never attained the proficiency required by the training curve.

[36] Debbie Campbell, Doris Lewis, Verna Simmons, and Shirley Sparkman.

[37] Shelia Carrol and Mary Walker.

[38] Gloria Dial and Marsha Walker.

[39] Freda DiUlio and Donna Thurman.

[40] Patsy Baxter, Rita Beard, Wilma Daniels, and Annie Patton.

[41] The General Counsel did not introduce into evidence the production graph of Bonnie Malugin, the fifth member of the committee, nor is there any explanation in the record for his failure to do so. In this connection, at the hearing the parties stipulated (G.C. Exh. 23) that the graphs of several named employees were unavailable, but the stipulation does not include Malugin's name. This being so, a finding concerning Malugin's meeting, or failing to meet, the standards of eligibility for rehire cannot be made.

[42] When the plant reopened it operated with only one production line, and Respondent could not, in the circumstances, be expected to rehire all employees discharged when the plant closed, at which time there were 3-1/2 lines in operation. In reality, therefore, what is being considered is whether Respondent violated Sec. 8(a)(3) of the Act in selecting employees for recall.

ent on their face. They appear to have been based on employee productivity and job performance.

The second matter for examination is whether Respondent's reemployment eligibility standards were discriminatorily applied. This, also, does not appear to have been the case. Thus, with one exculpable exception, all reemployed operators met Respondent's criteria for rehire. Conversely, no operator who failed to meet these standards was reemployed.

Despite the foregoing, and relying on Respondent's failure to recall two employees who had signed union cards, notwithstanding that they met Respondent's eligibility standards for reemployment; Respondent's failure to rehire any member of the Union's organizing committee; and some union animus on Respondent's part, the General Counsel argues that Respondent violated Section 8(a)(3) of the Act in selecting employees for rehire. I do not agree.

The argument that Respondent violated Section 8(a)(3) by not reemploying two operators who had signed union cards even though they were eligible for rehire passes over two relevant facts. The first is that two other eligible employees who had not signed union cards were also not reemployed. The second is that six employees who favored the Union, almost 30 percent of Respondent's operator complement, were not denied reemployment. This, in my opinion, does not bespeak an employer bent on destroying its employees' interest in a union by refusing to retain the union's supporters in its employ.

The contention that Respondent violated Section 8(a)(3) of the Act by failing to rehire the five members of the Union's organizing committee can be quickly answered. Four of them did not meet Respondent's standards of eligibility for reemployment. For the reasons set forth in boat footnote 41, above, I make no finding on this point concerning the fifth member of the committee.

Nor can it be said that Respondent was motivated by union animus in choosing whom to recall when the plant reopened. In the light of Respondent's nondiscriminatory criteria for determining eligibility for reemployment and their nondiscriminatory application, that Respondent may not have been favorably disposed toward the Union pales into insignificance.[43]

"An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."[44] Upon careful consideration of the record I find that the "believable evidence" does not "present a substantial basis" for holding that Respondent was motivated by an unlawful purpose in selecting employees for rehire when the plant was reopened.

Accordingly, I conclude that Respondent did not violate Section 8(a)(3) in its selection of employees for rehire on the plant's reopening. My Order will, therefore, provide for the dismissal of paragraphs 12, and the relating portions of paragraphs 13, 17, and 18, of the complaint.

IV. THE EFFECT OF RESPONDENT'S UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's unfair labor practices occurring in connection with its operations as set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VII. THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, my order will require Respondent to cease and desist therefrom and to take such affirmative action as will effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct Respondent has engaged, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act:

(a) Coercively interrogating employees regarding matters relating to the Union.

(b) Threatening an employee with plant closure upon the Union's advent.

(c) Promulgating and maintaining a rule prohibiting employees from engaging in oral solicitation on behalf of the Union in its plant during nonworking time.

(d) Promulgating and maintaining a rule prohibiting employees from distributing union material during nonworking time in nonworking areas of its plant.

4. Respondent did not violate Section 8(a)(3) of the Act by discharging its employees on the closing of its plant.

5. Respondent did not violate Section 8(a)(3) of the Act in selecting employees for rehire on the plant's reopening.

6. The unfair labor practices engaged in by Respondent, as set forth in Conclusion of Law, paragraph 3, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

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[43] "[T]he presence . . . of animus is merely one factor in evaluating motive." *Standard Aggregate Corp.*, 213 NLRB 154, 159 (1974). See also to the same effect *J. P. Stevens & Co., Inc.*, 181 NLRB 666, 667 (1970), modified in other respects 449 F.2d 595 (4th Cir. 1971).

[44] *N.L.R.B.* v. *T. A. McGahey, Sr., T. A. McGahey, Jr., Mrs. Altie McGahey Jones and Mrs. Wilda Frances McGahey Harrison, d/b/a Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956).

ORDER[45]

The Respondent, Mini-Industries, Inc., Columbia, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their attitudes toward, knowledge of, activities on behalf of, or as to any other matter relating to, Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board, or any other labor organization.

(b) Threatening employees with plant closure or with any other form of reprisal, or effectuating any such threats, should Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board, or any other labor organization become the collective-bargaining representative of any of its employees.

(c) Promulgating or maintaining any rule prohibiting employees from mangaging in oral solicitation on behalf of Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board, or any other labor organization, during nonworking time.

(d) Promulgating or maintaining any rule prohibiting employees from circulating or distributing handbills, circulars, or any other material, on behalf of Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board, or any other labor organization, in nonworking areas of its premises during nonworking time.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which it is found, will effectuate the policies of the National Labor Relations Act:

(a) Forthwith rescind and excise from the employee handbook issued in May 1978 the following paragraph appearing on page 17 thereof:

> 13. Circulation of handbills, circulars, petitions or solicitation before, during, or after hours on Company property.

Notify, in writing, all employees to whom the said handbook was issued of the foregoing paragraph's recision and excision.

(b) Post at its premises, copies of the attached notice marked "Appendix."[46] Copies of said notice, on forms being duly signed by Respondent, or its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that paragraphs 11, 12, 14, 15, and 16, and the relating portions of paragraphs 13, 17, and 18 of the complaint be, and the same hereby are, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence and arguments, it has been decided that we have violated the National Labor Relations Act. We have therefore been ordered to post this notice and carry out its terms.

> WE WILL NOT question you about anything connected with Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board, or any other union.
>
> WE WILL NOT close our plant or do anything else to your disadvantage; nor threaten to do any of these things if Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board, or any other union becomes your bargaining representative.
>
> WE WILL NOT make, or keep in force, any rule prohibiting employees from talking to other employees about joining, helping, or signing a a card, for Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board, or any other union, during nonworking time.
>
> WE WILL NOT make, or keep in effect, any rule prohibiting employees from passing out handbills, circulars, or any other material dealing with Amalgamated Clothing & Textile Workers Union, AFL-CIO, West Central Tennessee Joint Board or any other union, in nonworking locations, of our property during nonworking time.
>
> WE WILL immediately remove from our employee handbook paragraph 13, page 17.
>
> WE WILL respect your right to form any union, to support any union, to help any union, and to deal with us through any union, WE WILL also respect your rigfht not to do any of these things.

[45] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[46] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All our employees are free, without any objection from us, to become or remain members of any union, or not to become or remain members of any union.

MINI-INDUSTRIES, INC.